No. 14-280

Supreme Court, U.S.
FILED
SEP 5 - 2014
OFFICE OF THE CLERK

In The

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

MARK D. PLAISANCE
OFFICE OF PUBLIC DEFENDER
EAST BATON ROUGE PARISH
P.O. Box 796
Thibodaux, LA 70302
Tel: (985) 227-4588 Fax: (888) 820-6375
Plais77@aol.com

Attorney for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED FOR REVIEW

Henry Montgomery has been incarcerated since 1963. Montgomery is serving a mandatory life sentence for a murder he committed just 11 days after he turned seventeen years of age.

In light of *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 83 L.Ed.2d 407 (2012), which holds that mandatory sentencing schemes "requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole" violate the Eighth Amendment's ban on cruel and unusual punishment, Montgomery filed a state district court motion to correct his illegal sentence. The trial court denied Montgomery's motion, and on direct writ application, the Louisiana Supreme Court denied Montgomery's application, citing *State v. Tate*, 2012-2763 (La. 11/5/13), *cert. denied*, 134 S.Ct. 2663, 189 L.Ed.2d 214 (2014), which held that *Miller* is not retroactive on collateral review to those incarcerated in Louisiana.

The question thus presented here is whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

State of Louisiana, through the East Baton Rouge Parish District Attorney's Office.

Henry Montgomery, an individual incarcerated in the state of Louisiana.

CORPORATE DISCLOSURE

The state of Louisiana is a body politic. The East Baton Rouge Parish District Attorney's Office is a subdivision of the state of Louisiana.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE	ii
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
ARGUMENT	3
I. *Miller* is retroactive under *Teague* and its progeny	6
II. *Miller* is retroactive under its reasoning and applicability	10
CONCLUSION	15

APPENDIX

District Court Ruling	App. 1
Supreme Court Opinion	App. 3

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) 10, 13

Black v. Bell, 664 F.3d 81 (6th Cir. 2011) 13

Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) 9

Chambers v. State, 831 N.W.2d 311 (Minn. 2013) 4

Commonwealth v. Cunningham, 81 A.3d 1 (Pa. 2013), *cert. denied*, 134 S.Ct. 2724 (2014) 4

Craig v. Cain, 2013 WL 69128 (5th Cir. 2013) 3, 4

Danforth v. Minnesota, 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) 6

Diatchenko v. Dist. Att'y Suffolk Cnty., 1 N.E.3d 270 (Mass. 2013) 3

Edding v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) 12

Geter v. State, 115 So.3d 375 (Fla. 3d Dist. Ct. App. 2012) 4

Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) 11, 12, 13

Hooks v. Workman, 689 F.3d 1148 (10th Cir. 2012) 13

In re Morgan, 713 F.3d 1365 (11th Cir. 2013) 4

In re Moss, 703 F.3d 1301 (11th Cir. 2013) 13

TABLE OF AUTHORITIES – Continued

Page

In re Simpson, 555 Fed.Appx. 369 (5th Cir. 2014) 4

In re Sparks, 657 F.3d 258 (5th Cir. 2011) 13

Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011) 14

Jackson v. Norris, 2013 Ark. 175, 426 S.W.3d 906 (Ark. 2013) 14

Johnson v. Ponton, 2013 WL 5663068 (E.D. Va. 2013) 5

Johnson v. Texas, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) 13

Johnston v. United States, 720 F.3d 720 (8th Cir. 2013) 4

Jones v. State, 122 So.3d 698 (Miss. 2013) 4

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) 12

Martin v. Symmes, 2013 WL 5653447 (D. Minn. 2013) 5

Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, 83 L.Ed.2d 407 (2012) ..... *passim*

Miller v. State, 63 So.3d 676 (Ala. Crim. App. 2010) 14

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) 7

TABLE OF AUTHORITIES – Continued

Page

People v. Carp, 298 Mich.App. 472 (Mich. Ct. App. 2012), *aff'd*, 496 Mich. 440 (Mich. 2014).....4

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 153 L.Ed.2d 335 (2002).....10, 11, 13

Schiro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).....5, 6, 8, 9

State v. Mantich, 287 Neb. 320 (Neb. 2014).....4, 8

State v. Montgomery, 248 La. 713, 181 So.2d 756 (1966).....2

State v. Montgomery, 257 La. 461, 242 So.2d 818 (1970).....2

State v. Montgomery, 2013-1163 (La. 6/20/14), 141 So.3d 264 .....1, 3

State v. Ragland, 836 N.W.2d 107 (Iowa 2013).....3

State v. Tate, 2012-2763 (La. 11/5/13), *cert. denied*, 134 S.Ct. 2663, 189 L.Ed.2d 214 (2014).....3, 4

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).....*passim*

Wang v. United States, 13-2426 (2d Cir. 2013).....4

Ware v. King, 2013 WL 4777322 (S.D. Miss. 2013).....5

Williams v. United States, 13-1731 (8th Cir. 2013).....4

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII 1, 5, 10, 11, 12

U.S. Const. amend. XIV 1

STATUTES

28 U.S.C. §1257(a) 1

La. R.S. 15:574.4(E) 8

CODE OF CRIMINAL PROCEDURE

La. C.Cr.P. art. 878.1 (2013 La. Act. 239) 8

LEGISLATIVE ACTS

Acts 1980, No. 843 §1 1

OPINIONS BELOW

The District Court ruling denying Montgomery's motion to correct illegal sentence is unreported and is attached as Appendix App. 1. The Louisiana Supreme Court's denial of Petitioner's writ application is reported as *State v. Montgomery*, 2013-1163 (La. 6/20/14), 141 So.3d 264, and attached as Appendix App. 3.[1]

JURISDICTION

The Louisiana Supreme Court denied Montgomery's writ application on June 20, 2014. This court has jurisdiction under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

---

[1] Prior to Acts 1980, No. 843 §1, effective July 1, 1982, felony criminal convictions in Louisiana were appealed directly to the state supreme court since Louisiana courts of appeal did not have criminal appellate jurisdiction. The same appellate procedure applies to collateral review of those matters.

> No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Henry Montgomery has been incarcerated since 1963. He is serving a life sentence for the murder of Charles Hunt that he committed less than two weeks past his seventeenth birthday.[2]

Because Montgomery is not eligible for parole consideration under Louisiana's interpretation of this Court's decision in *Miller*, he will die in prison.

Although 17, Montgomery was originally sentenced to die. His conviction was reversed and he was granted a new trial on direct appeal by the Louisiana Supreme Court on grounds of undue community prejudice. *State v. Montgomery*, 248 La. 713, 181 So.2d 756 (1966). On retrial, the jury returned a guilty verdict without capital punishment and Montgomery was given a life sentence in the state penitentiary. His conviction and sentence were affirmed. *State v. Montgomery*, 257 La. 461, 242 So.2d 818 (1970).

Nearly 50 years later, in light of *Miller*, Montgomery, *pro se*, moved for the state district court to

---

[2] Montgomery was born June 17, 1946.

correct his illegal sentence, arguing that because he was a juvenile, he is entitled to a new sentence hearing with the possibility of parole.[3] Without conducting a contradictory hearing, the district court denied Montgomery's motion. (App. 1). It held that Montgomery did not overcome the general bar to retroactivity on collateral review, citing *Craig v. Cain*, 2013 WL 69128 (5th Cir. 2013).

Montgomery's writ application to the Louisiana Supreme Court was denied, 6-1. *State v. Montgomery*, 2013-1163 (La. 6/20/14), 141 So.3d 264, citing *Tate*, supra. In dissent, Chief Justice Johnson found that "*Miller* announced a new rule of criminal procedure that is substantive and consequently should apply retroactively." (App. 3).

ARGUMENT

Whether *Miller* is retroactive on collateral review is straightforward.[4]

---

[3] The court later appointed the East Baton Rouge Parish Public Defender's Office to represent Montgomery.

[4] *Miller*'s retroactivity has been subject to a divided nationwide judiciary.

See, e.g., *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013) (unanimously holding *Miller* is retroactive because it creates "a substantive change in the law that prohibits mandatory life without parole sentencing"); *Diatchenko v. Dist. Att'y Suffolk Cnty.*, 1 N.E.3d 270, 281 (Mass. 2013) (*Miller* is retroactive because it "explicitly forecloses the imposition of a certain category

(Continued on following page)

Compare and contrast: *Craig*, supra (different Fifth Circuit panel reached opposite conclusion); *Tate*, supra; *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013) (two justices dissented and two concurring justices called on this Court to resolve *Miller*'s retroactivity); *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013) (4-3 decision), *cert. denied*, 134 S.Ct. 2724 (2014); *Geter v. State*, 115 So.3d 375 (Fla. 3d Dist. Ct. App. 2012); *People v. Carp*, 298 Mich.App. 472 (Mich. Ct. App. 2012), *aff'd*, 496 Mich. 440 (Mich. 2014); *In re Morgan*, 713 F.3d 1365, 1367-68 (11th Cir. 2013) (reasoning that a "new rule is substantive when that rule places an entire class beyond

---

of punishment – mandatory life in prison without the possibility of parole – on a specific class of defendants: those individuals under the age of eighteen when they commit the crime of murder. Its retroactive application ensures that juvenile homicide offenders do not face a punishment that our criminal law cannot constitutionally impose on them."); *Jones v. State*, 122 So.3d 698, 702 (Miss. 2013) (*Miller* is a retroactive, substantive rule because it "modified our substantive law by narrowing its application for juveniles"); *State v. Mantich*, 287 Neb. 320, 341-42 (Neb. 2014) ("the fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile . . . demonstrates the rule announced in *Miller* is a substantive change in the law" and "[b]ecause the rule announced in *Miller* is more substantive than procedural" it applies retroactively); *Williams v. United States*, 13-1731 (8th Cir. 2013) (order granting motion to file successive habeas petition brought solely on ground that *Miller* is a new rule retroactively applicable to cases on collateral review); *Wang v. United States*, 13-2426 (2d Cir. 2013) (same); *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (per curiam) (same); *In re Simpson*, 555 Fed.Appx. 369 (5th Cir. 2014).

the power of the government to impose a certain punishment regardless of the procedure followed" and thus *Miller* is not retroactive because it "did not prohibit the imposition of a sentence of life imprisonment without the possibility of parole on minors"); *Ware v. King*, 2013 WL 4777322 (S.D. Miss. 2013) (*Miller* is not retroactive); *Johnson v. Ponton*, 2013 WL 5663068 (E.D. Va. 2013) (same); and *Martin v. Symmes*, 2013 WL 5653447 (D. Minn. 2013) (same).

The new law announced in *Miller* – a statutory scheme which mandates imposition of the maximum possible sentence upon a juvenile offender (life without parole) without the opportunity for the sentencer to consider any circumstances of the crime or of the criminal that mitigate against a sentence of life without parole, violates the Eighth Amendment to the United States Constitution – is a substantive constitutional rule that mandates courts to implement a new procedure in the sentencing of juveniles.

This conclusion is rooted within the first strand of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)[5] and within the reasoning and application of *Miller*. Thus, as a substantive rule and

---

[5] The second strand or exception articulated in *Teague* is "watershed rules of criminal procedure" creating new procedures "without which the likelihood of an accurate conviction is seriously diminished." This class of rules is extremely narrow. *Schiro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

an applied rule, *Miller* equally affects cases on direct review and those on collateral review.

This Court should intervene to ensure its mandate is followed and consistent among all state and federal courts.

I. *Miller* is retroactive under *Teague* and its progeny.

Miller created a new substantive rule[6] that is retroactively applicable to cases on collateral review.[7] It imposes a new obligation on states [Louisiana] that was not dictated by precedent existing at the time Montgomery's conviction became final, *Teague*, 489 U.S. at 301, and it places Montgomery or his conduct "beyond the state's power to punish." *Summerlin*, supra. In other words, because *Miller* narrowed the scope of the state's power to punish with a sentence of

---

[6] The source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists the articulation of the rule. What the court actually determines when it assesses "retroactivity" of a rule is not the temporal scope of the newly announced right, but whether a violation of that right occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought. *Danforth v. Minnesota*, 552 U.S. 264, 271, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).

[7] In general, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced, but only to cases pending on direct appeal at the time of the rule's announcement or to cases arising after the Court announced the rule. *Teague*, 489 U.S. at 310, 109 S.Ct. 1060.

life without parole and requires the observance of a sentencing procedure implicit in the concept of ordered liberty, it is a new substantive rule for *Teague* purposes and is retroactive to cases final before its announcement.

Miller is also a substantive rule because it prohibits a "certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). It now prohibits mandatory sentences of life without parole for juvenile homicide offenders. Simply, *Miller* is a substantive rule because it puts juveniles beyond the reach of criminal statutes that would otherwise impose a mandatory sentence of life without the possibility of release on all offenders convicted of certain types of homicide. *Miller* narrows the state's power to punish juveniles with a sentence of life imprisonment without parole. Now, a court must take into account that children (juveniles) are different and must consider how those differences ameliorate against irrevocably sentencing them to a lifetime in prison. *Id.*, 132 S.Ct. at 2469.

This change, in the range of permissible methods by which a juvenile can now be punished, further functions as a new [substantive] element that must be considered before a juvenile may be sentenced to life imprisonment without release. While *Miller* does not create a categorical ban on punishment of life in

prison without the possibility of parole, this Court in *Miller* did identify a class of persons for whom the state must allow consideration of additional elements before punishment can be imposed. *Id.*, 132 S.Ct. at 2469. Thus, the elements required for mandatory life imprisonment without release were modified, which this Court in *Summerlin* identified as a signal of a substantive rule. *See Summerlin*, 542 U.S. at 354.[8]

---

[8] The substantive aspect of *Miller* further prompted the Louisiana Legislature to amend sentencing laws for juveniles convicted of first and second degree murder. Louisiana now requires a district court to conduct a hearing before sentencing to determine whether a life sentence to be imposed on a juvenile homicide offender should be with or without parole eligibility. La. C.Cr.P. art. 878.1 (2013 La. Act. 239). At this hearing, the juvenile can introduce mitigating evidence relevant to the charged offense or to his character, including, but not limited to, facts and circumstances of the crime, his level of family support, social history and other factors the court may deem relevant. Moreover, under the new act, "[s]entences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases."

A juvenile sentenced to parole consideration may now be eligible for parole after serving 35 years of the sentence imposed. La. R.S. 15:574.4(E). In comparison, Montgomery has now served 51 years.

See Mantich, supra (Most specifically, the fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile from a mandatory sentence of life imprisonment to a sentence of 40 years to life imprisonment demonstrates the rule announced in *Miller* is a substantive change in the law.).

Nebraska's writ of certiorari is pending before this Court: *Nebraska v. Mantich*, 13-1348.

Thus, in the wake of *Miller*, the sentencer must have the discretion to select an appropriate and proportionate sentence for such a juvenile from a range bound by "a lifetime prison term *with* the possibility of parole or a lengthy term of years" on the low end and by life without parole on the high end. *Miller*, 132 S.Ct. at 2471. In this sense, *Miller* fundamentally and substantively alters criminal sentences by expanding the range of sentencing options available for juvenile offenders. *See Summerlin*, 542 U.S. at 353 (citing *Bousley v. United States*, 523 U.S. 614, 620-21, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)) (a rule "is substantive rather than procedural if [the rule] alters the range of conduct or the class of persons that the law punishes"). In this regard, the change in *Miller* is substantive because Montgomery is serving a sentence that the state may not be able to impose on him.

Finally, the change in *Miller* is substantive because of another important *Teague* rule effecting equal justice: If one petitioner gets the benefit of a new rule, then the rule should apply retroactively to others similarly situated as any other approach would be inequitable. *Id.*, 489 U.S. at 315. "The harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment 'hardly comports with the ideal of "administration of justice with a even hand."'" In *Teague*, this Court stated it would "simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the

case and to *all* others similarly situated." *Id.*, 489 U.S. at 316 ["implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated"].

Montgomery is therefore entitled to the benefit of the *Miller* rule.

II. *Miller* is retroactive under its reasoning and applicability.

Two additional factors counsel in favor of concluding that *Miller* is substantive in nature, and thus retroactive: (1) the rule of cases from which it emanates have been held to be substantive in nature, and (2) this court constructed its *Miller* rule in part to a companion case on collateral review.

First, this Court stated that the rule in *Miller* arose from "two strands of precedent reflecting [our] concerns with proportionate punishment." *Miller*, 132 S.Ct. at 2463. The first line of cases held the Eighth Amendment bar against cruel and unusual punishment categorically banned sentencing practices due to mismatched culpability of a class of offenders and the severity of the sentence imposed. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (Eighth Amendment prohibits execution of "mentally retarded" offenders); *Roper v. Simmons*,

543 U.S. 551, 125 S.Ct. 1183, 153 L.Ed.2d 335 (2002) (Eighth Amendment prohibits imposition of death penalty on juvenile offenders who were under eighteen years of age when crimes committed); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (Eighth Amendment prohibits imposition of life in prison without parole on juvenile offenders convicted of non-homicide crimes who were under eighteen years of age when crimes were committed).

Of particular importance here, the decisions in *Graham* and *Roper* established that juvenile offenders are "constitutionally different from adults for purposes of sentencing" because they have "diminished culpability and greater prospects for reform," and therefore, they do not deserve "the most severe punishment." *Miller*, 132 S.Ct. at 2464.

Thus, the rule in *Miller* arises from these precedents. *Id.*, 132 S.Ct. at 2463: "[c]hildren are different," and thus, "distinctive attributes of youth" such as lack of maturity, underdeveloped sense of maturity, recklessness, impulsivity, and risky behavior "diminish the penological justifications" for sentencing juveniles to life imprisonment without the possibility of parole, "even when they commit terrible crimes." *Miller*, 132 S.Ct. at 2464-65.

When discussing *Graham*, this Court considered the trial court's ability to recognize the "mitigating qualities of youth," which it cannot do when such a sentence is mandatory. *Id.* at 2467-68. Ultimately,

this Court extended the rationale of *Graham* and found that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 2469. Therefore, this Court held, such mandatory sentences are unconstitutional and the sentencing court must consider the defendant's "youthful characteristics" when fashioning a sentence. *Id.*

The second strand of precedents underpinning *Miller* "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him." *Miller*, 132 S.Ct. at 2463-64. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (Eighth Amendment prohibits imposition of death penalty absent individualized consideration of relevant mitigating evidence, including character and record of defendant and circumstances of offense); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion) (same). These decisions led this Court to recognize in *Miller*, based upon death penalty jurisprudence, that a defendant who is going to be subjected to a state's harshest penalty must "have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." *Miller*, 132 S.Ct. at 2467. In particular, "a sentencer [must] have the ability to consider

the 'mitigating qualities of youth.'" *Id.*, quoting *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993).

Thus, the *Miller* requirement that courts conduct an individualized sentencing hearing tailored to the unique attributes of juveniles when prosecuted as adults for homicide is the next logical evolution of *Atkins*, *Roper*, and *Graham*, cases unanimously held by subsequent lower courts to have articulated substantive rules and therefore applicable to collateral appeals. *See, e.g., In re Sparks*, 657 F.3d 258 (5th Cir. 2011) (noting "the Supreme Court's decision in *Atkins* barring the execution of the mentally retarded has been given retroactive effect as has the Court's decision in *Roper*, barring the execution of juvenile offenders").[9]

In addition, the procedural posture of the *Miller* decision further supports retroactive application. In *Miller*, this Court did more than articulate a new rule. It ordered implementation of the rule in a companion case before this Court on collateral review. Evan Miller – convicted of capital murder committed when he was fourteen years old and sentenced to life in prison without possibility of parole – was before the Court on direct appeal from the Alabama Court of Criminal Appeals, which affirmed his conviction and

---

[9] Accord, *In re Moss*, 703 F.3d 1301 (11th Cir. 2013) (*Graham*); *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (*Atkins*); *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011) (*Atkins*).

sentence. *Miller v. State*, 63 So.3d 676 (Ala. Crim. App. 2010). Kuntrell Jackson – who was convicted of capital felony murder and aggravated robbery also committed at the age of fourteen years old and sentenced to life in prison without the possibility of parole – was before the Court on collateral review, after the Arkansas Supreme Court affirmed the dismissal of his state habeas petition by the Arkansas Circuit Court. *Jackson v. Norris*, 378 S.W.3d 103 (Ark. 2011). In *Jackson*, in particular, this court reversed the Arkansas post-conviction courts' denial of habeas relief and remanded for further proceedings. *Miller*, 132 S.Ct. at 2475. On remand, the Arkansas Supreme Court sent the case back to the state trial court for re-sentencing in accordance with the *Miller* opinion. *Jackson v. Norris*, 2013 Ark. 175, 426 S.W.3d 906 (Ark. 2013).

This court's ruling in *Jackson* is dispositive: Implicit in the retroactivity approach in *Teague* is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules apply retroactively to *all* defendants on collateral review. (Emphasis added). *Teague*, 489 U.S. at 316. Because, "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated," the *Teague* approach to retroactivity directs the court considering a new rule to "refuse to announce [it] in a given case unless the rule would be applied retroactively to the defendant in the case and to all others

similarly situated." *Id.* at 316. Moreover, there would have been no reason for the Court to direct such an outcome if it did not view the *Miller* rule as applying retroactively to cases on collateral review.[10]

Simply put, because the rationale of *Miller* applied to Jackson, it applies to Montgomery.

CONCLUSION

Henry Montgomery is destined to die in prison for a crime he committed while a juvenile. He has no opportunity at parole like Kuntrell Jackson or any other Louisiana juvenile now convicted for the same crime. *Miller* dictates that the sentencing court consider myriad factors in sentencing a juvenile, including the possibility of parole. That sentencing scheme should be afforded to Montgomery. This court's holding in *Teague* and its application in *Miller* (vis-a-vis *Jackson*) mandate as much.

[10] The dissent in *Miller* suggests the same result, that the majority's decision would invalidate other cases across the nation. *Id.*, 132 S.Ct. at 2479-80 (Roberts, C.J., dissenting).

This court should grant this writ of certiorari to clarify that *Miller* applies to those currently facing sentencing, those whose sentence is on direct appeal, and to those – having already been sentenced – seeking collateral review.

Respectfully submitted,

MARK D. PLAISANCE
Attorney for Petitioner

STATE OF LOUISIANA	NO. 48,489 SECTION II
	19th JUDICIAL DISTRICT COURT
VERSUS	PARISH OF EAST BATON ROUGE
HENRY MONTGOMERY	STATE OF LOUISIANA

ORDER

HAVING CONSIDERED Defendant's Motion to Correct an Illegal Sentence filed in the above numbered and captioned cause,

IT IS ORDERED THAT the motion is DENIED.

The defendant was convicted of the murder of Charles Hurt in February of 1964. At the time of the offense, the defendant was seventeen years of age. The defendant was granted a new trial in 1969, but was found guilty again in February of 1969 and was sentenced to life imprisonment.

In **Miller v. Alabama**, 132 S. Ct. 2455 (2012), the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." In order for a new rule to overcome the bar to retroactivity on collateral review, one of the two **Teague** exceptions must be met. **Teague v. Lane**, 489 U.S. 288, 307 (1989). The first exception applies when a new rule completely removes a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants.

See **Craig v. Cain**, 2013 WL 69128 (C.A.5(La.)). Therefore, it does not satisfy the first exception for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles. **Miller** bars only those sentences made mandatory by a sentencing scheme. *See* **Craig v. Cain**, 2013 WL 69128 (C.A.5(La.)).

The second exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." **Teague**, 489 U.S. at 307. The holding in **Miller** does not qualify as a "watershed rule," *See* **Craig v. Cain**, 2013 WL 69128 (C.A.5 (La.)), and therefore, does not satisfy the requirements of the second exception of **Teague**.

Therefore, for the reasons stated above, the present case does not overcome the general bar to retroactivity and the Defendant's motion is DENIED.

THUS DONE AND SIGNED this 30th day of January, 2013, in Baton Rouge, Louisiana.

/s/ Richard D. Anderson
JUDGE RICHARD D. ANDERSON
19th JUDICIAL DISTRICT COURT

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. NO. 2013-KP-1163

HENRY MONTGOMERY

IN RE: Montgomery, Henry; – Defendant; Applying For Supervisory and/or Remedial Writs, Parish of E. Baton Rouge, 19th Judicial District Court Div. G, No. 48-489; to the Court of Appeal, First Circuit, No. 2013 KW 0442;

June 20, 2014

Denied. The district court did not err in denying relator's Motion to Correct an Illegal Sentence. See State v. Tate, 12-2763 (La. 11/5/13), 130 S.Ct. 829, cert. denied, Tate v. Louisiana, No. 13-8915 (May 27, 2014).

JTK

JPV

JLW

GGG

MRC

JDH

JOHNSON, C.J., dissents and would grant the writ and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2013-KP-1163 JUN 20 2014

STATE OF LOUISIANA

VERSUS

HENRY MONTGOMERY

ON SUPERVISORY WRITS TO THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

[/s/ BJJ] **JOHNSON**, C.J. dissents and would grant the writ.

I respectfully dissent. On June 25, 2012, the United States Supreme Court issued an opinion in *Miller v. Alabama,* which held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller v. Alabama,* 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012). In *State v. Tate,* 2012-2763 (La. 11/5/13), 130 So. 3d 829, this court held that *Miller* does not retroactively apply to juvenile offenders whose life sentences were handed down before the Supreme Court issued its opinion. I dissented from this court's ruling in *Tate,* finding that *Miller* announced a new rule of criminal procedure that is substantive and consequently should apply retroactively. For the same reasons expressed in my dissent in *Tate*, I must dissent in this case.